No. 22,710

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner

v.

SAN CLEMENTE PUBLISHING CORPORATION;
COASTLINE PUBLISHERS, INC., Respondents

ON PETITION FOR ENFORCEMENT OF AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

WARREN M. DAVISON,
ROBERT M. LIEBER,
Attorneys,

National Labor Relations Board.

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JURISDICTION

This case is before the Court on petition of the National Labor Relations Board for enforcement of its order (R. 32-33)[1] issued against respondents (hereafter "the Company") on August 10, 1967, and reported at 167 NLRB No. 2. The

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[1] The original papers in the case have been reproduced and transmitted to the Court pursuant to Rule 10(2). "R" refers to the formal documents bound as "Volume I, Pleadings"; "Tr." refers to the stenographic transcript of testimony at the unfair labor practice hearing. References designated "GCX" and "JX" are to the General Counsel's exhibits and the Joint Exhibit, respectively. Whenever in a series of references a semicolon appears, references preceding the semicolon are to the Board's findings; those following, to the supporting evidence.

unfair labor practice occurred at San Clemente, California, where the Company is engaged in business as a newspaper publisher. The Court has jurisdiction of the proceedings under Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*).[2]

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

Prior to the events herein, respondent's composing room personnel—a concededly appropriate unit (R. 20; GCX 1(e), 1(*l*)) consisting, at all material times, of 5 employees (R. 20)—were unrepresented by a labor organization. In October 1966, the Union[3] and the Company agreed to allow a "mutually acceptable" third party to poll the unit employees to see if they wanted union representation (R. 21; GCX 1(e), para. 6(a)(b), GCX 1(*l*), JX). The Company agreed to recognize the Union as the collective bargaining agent of the employees if a majority of them expressed that preference (*Ibid.*). A person agreeable to both sides was selected, and the poll was conducted on October 24 (R. 21; GCX 1(e), para. 7, 8, GCX 1(g), GCX 1(*l*), JX). The Company was advised that a "majority" of the employees desired that the Union represent them (*Ibid.*). A few days later the Company, pursuant to its agreement and following a request by the Union, recognized the Union as its employees' exclusive bargaining representative (R. 21; GCX 1(e), para. 9, GCX 1(*l*)).

The first bargaining session was held on November 29 (R. 21; GCX 1(e), para. 10, GCX 1(*l*), JX). Although agreement was not reached, it is undisputed that the parties had not reached an impasse at the end of the meeting (*Ibid.*).

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[2]The pertinent provisions of the Act are printed as Appendix A to this brief, *infra.*

[3]Orange Typographical Union No. 579, International Typographical Union, AFL-CIO.

In early December 1966, one of the unit employees quit his job and was replaced by a new employee (R. 21; Tr. 31, JX). A few days later, three of the five employees in the unit told Company officials that when the poll had been taken the employees had favored union representation by a vote of 3 - 2 (R. 21; Tr. 40-41, JX). Now that one employee had been replaced, they reported, employee sentiment was 3 - 2 against the Union (*Ibid.*). The three employees presented a written petition to the Company, stating that they had no wish to be represented by the Union (*Ibid.*). Shortly thereafter the Company withdrew recognition from the Union, and since then has refused to recognize the Union as its employees' bargaining representative (R. 21; GCX 1(e) para. 12, GCX 1(*l*), JX).

II. THE BOARD'S CONCLUSION AND ORDER

Based on the foregoing, the Board, in agreement with the Trial Examiner found that the Company violated Section 8(a)(5) and (1) of the Act by terminating a legally established bargaining relationship without permitting such relationship to function for a reasonable period of time.

The Board's order (R. 26, 32-33) requires the Company to cease the unfair labor practice found and from in any like or related manner interfering with its employees' rights under the Act, Affirmatively, the Board ordered the Company to bargain with the Union as the exclusive representative of its employees in the unit and to post appropriate notices.

ARGUMENT

THE BOARD PROPERLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY TERMINATING A LEGALLY ESTABLISHED BARGAINING RELATIONSHIP WITHOUT PERMITTING SUCH RELATIONSHIP TO FUNCTION FOR A REASONABLE PERIOD OF TIME

As related in the Statement, *supra,* the Company, in late October, recognized the Union as the exclusive bargaining representative of its employees. After only one bargaining session, the Company, on December 14, withdrew recognition from the Union after 3 of the 5 unit employees said they did not desire union representation. The only question presented, therefore, is whether the Board properly found the Company's conduct to be a violation of Section 8(a)(5) and (1) of the Act.

It is well-settled that "a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed." *Franks Bros. Co. v. N.L.R.B.,* 321 U.S. 702, 706. Moreover, it is clear that the bargaining relationship must be given a fair chance to succeed even if, shortly after the attainment of its majority status, the union loses that status through no fault of the employer. *Ray Brooks v. N.L.R.B.,* 348 U.S. 96; *Retail Clerks Union, Local 1179 v. N.L.R.B. (John P. Serpa, Inc.),* 376 F.2d 186, 191 (C.A. 9). In *Brooks,* the union won a Board conducted election by the narrow margin of 8-5. A week after the election, and prior to the Board's certification of the union, the employer received a letter signed by nine of the thirteen employees stating that they no longer wished to be represented by the union. The employer thereupon refused to bargain. The Court expressly rejected the argument that "whenever an employer is presented with evidence that his employees have deserted their certified union, he may forthwith refuse to bargain." 348 U.S. at 103. Upholding the Board, the Court held that despite the evidence of loss of majority, the elec-

tion results must be honored for a reasonable period of time and, at least until the passage of such period, the actual majority status of the union and the employer's beliefs with respect thereto did not justify a refusal to bargain. Reasons advanced by the Board in support of this result have relevance here and are quoted approvingly in the Court's opinion (348 U.S. at 100):

* * *

> (c) A union should be given ample time for carrying out its mandate on behalf of its members, and should not be under exigent pressure to produce hothouse results or be turned out.
>
> (d) It is scarcely conducive to bargaining in good faith for an employer to know that, if he dillydallies or subtly undermines, union strength may erode and thereby relieve him of his statutory duties at any time, while if he works conscientiously toward agreement, the rank and file may, at the last moment, repudiate their agent.

* * *

Thus, the Court recognized that it would be detrimental to the Congressionally encouraged process of peaceful negotiation if employers and unions knew that the union's authority was subject to revocation each and every time the employee sentiment shifted. If the collective bargaining process is to succeed, there must be an initial period in which that authority must be free from challenge. Under a contrary rule, a recalcitrant employer would obviously have much to gain by delay. *Retail Clerks Union, Local 1179 v. N.L.R.B. (Serpa), supra,* 376 F.2d at 191. Even a law-abiding employer would be deterred by the knowledge that time and effort put into negotiations could be set at naught should the union lose its majority before a final contract had been signed and thereby lose its authority to enter into a binding agreement. From the Union's point of view, there would be immense pressure to score a quick contract victory, perhaps by the application of ill-considered and disruptive economic action against the employer, rather than face the

possibility of loss of support during a lengthy negotiating period. In addition to *Brooks, supra,* see, e.g., *N.L.R.B. v. Holly-General Co.,* 305 F.2d 670, 675 (C.A. 9); *N.L.R.B. v. Appalachian Electric Power Co.,* 140 F.2d 217, 221-222 (C.A. 4). Only if the parties can rely on the continuing representative status of the lawfully recognized union, at least for a reasonable period of time, can bargaining negotiations succeed and the policies of the Act be effectuated.

The instant case is distinguishable from *Brooks, supra,* only in that here the bargaining relationship was established after a third party, at the request of the parties, determined that a majority of the employees desired to be represented by the Union, whereas in *Brooks* the union's majority had been established by a Board election. We submit, however, that this distinction is without consequence here.

It has long been settled that a "Board election is not the only method by which an employer may satisfy itself as to the union's majority status." *United Mine Workers v. Arkansas Oak Flooring,* 351 U.S. 62, 72, n. 8. Thus, unless he has a good faith doubt of the Union's majority, an employer must recognize a Union as his employees' exclusive representative after the Union demonstrates its majority—whether by authorization cards or some other reliable method. *Snow v. N.L.R.B.,* 308 F.2d 687, 692 (C.A. 9); *N.L.R.B. v. W. T. Grant Co.,* 199 F.2d 711, 711-712 (C.A. 9), cert. denied, 344 U.S. 928; *N.L.R.B. v. Trimfit of California, Inc.,* 211 F.2d 206, 208-210 (C.A. 9); *N.L.R.B. v. Sehon Stevenson & Co., Inc.,* 386 F.2d 551, 552 (C.A. 4). See also, *N.L.R.B. v. Hyde,* 339 F.2d 568, 570-571 (C.A. 9). "The manner in which an employer receives reliable information of union representation, whether by accident or by design, or even when the employer is seeking to avoid receiving it, is of no consequence. Once he has received such information from a reliable source, insistence upon a Board election can no longer be defended on the grounds of a genuine doubt as to majority status." *Snow v. N.L.R.B., supra,* 308 F.2d at 692.

Indeed, Congress, in 1947, expressly rejected a proposed amendment to the Act which would have required an employer to recognize a union *only* where it had been certified as the winner of a Board election. See, Lesnick, *Establishment of Bargaining Rights Without an NLRB Election,* 65 Mich. L.Rev. 851, 861, and the legislative history cited at 861, n. 45 (1967).

Thus, there can be no question that the bargaining relationship was lawfully entered into. Thereafter, it, like the relationship in *Brooks,* should be given a fair chance to succeed. Unless this bargaining relationship is insulated in its initial stages from the pressures described in *Brooks,* the purpose of the Act to foster healthy and peaceful collective bargaining will be poorly served. The potential evils described by the Supreme Court in *Brooks*—encouraging delay by recalcitrant employers, deterrence of conscientious employers fearful that their time and effort will be wasted because the union may lose support at the last moment, and inordinate pressure on unions to "produce" or be turned out —are equally present whether the relationship be initially established by election or other lawful means.

In *Franks Bros., supra,* the bargaining relationship was not initially established by an election. There, despite the fact that a majority of the employees had designated a union, the employer had illegally refused to bargain. The Board issued a bargaining order which the company resisted on the ground that the union had lost its majority since the institution of the unfair labor practice proceeding due to a turnover in the Company's work force. 321 U.S. 702, 703-704. It was in this context that the Court ruled that bargaining relationships rightfully established must be given a reasonable chance to succeed, citing *N.L.R.B. v. Appalachian Power Co.,* 140 F.2d 217 (C.A. 4), a case identical to the later *Brooks* case. Consistent with *Franks Bros.,* an employer has been held to be obligated to bargain for a reasonable

period of time, following a court decree,[4] Board order,[5] or a settlement agreement,[6] even though the union subsequently suffered a loss of majority.

The facts here show that the bargaining relationship was given virtually no chance of success. Only one bargaining

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[4] *N.L.R.B. v. Warren Co.*, 350 U.S. 107, 112; *N.L.R.B. v. Vander Wal*, 316 F.2d 631, 633-634 (C.A. 9).

[5] *Int'l Ass'n of Machinists v. N.L.R.B.*, 311 U.S. 72, 82-83; *Great Southern Trucking Co. v. N.L.R.B.*, 139 F.2d 984, 985 (C.A. 4), cert. denied, 322 U.S. 729; *N.L.R.B. v. Consolidated Mach. Tool Corp.*, 167 F.2d 470 (C.A. 2); *N.L.R.B. v. Tower Hosiery Mills*, 180 F.2d 701, 706 (C.A. 4), cert. denied, 340 U.S. 811; *N.L.R.B. v. S. H. Kress & Co.*, 194 F.2d 444, 446 (C.A. 6); *N.L.R.B. v. J. C. Hamilton Co.*, 220 F.2d 492, 495 (C.A. 10). See also, *Sakrete of Northern California, Inc. v. N.L.R.B.*, 332 F.2d 902, 909 (C.A. 9), cert. denied 379 U.S. 961.

[6] *Poole Foundry & Mach. Co. v. N.L.R.B.*, 192 F.2d 740 (C.A. 4), cert. denied, 342 U.S. 954; *W. B. Johnston Grain Co.*, 154 NLRB 1115, 1116, 1118-1120. In a recent case in this area, *N.J. MacDonald & Sons, Inc.*, 155 NLRB 67, the employees designated a union as their bargaining representative on May 18, 1964. When the employer refused to bargain, a complaint alleging violation of Section 8(a)(5) and (1) of the Act issued. A settlement agreement was entered into providing, *inter alia*, that the employer would bargain upon request with the union. Nine bargaining sessions took place between the time this settlement agreement was entered into and January 25, 1965. On that latter date, approximately six months after the settlement agreement was signed, eleven of the thirteen unit employees presented the employer with a petition rejecting the union. The employer then refused to bargain. 155 NLRB at 69-70. Citing and relying on *Brooks, supra*, the Board held that "it would not be conducive to industrial peace and stable labor relations for an employer to rely on such employee dissatisfaction in refusing to bargain with a union which is the employees' statutory bargaining representative", 155 NLRB at 72, where the potentials of negotiations had not been exhausted and a reasonable period of time had not elapsed since the commencement of negotiations. There, as here, there had been no certification of the union following a Board election. Nevertheless, the Court of Appeals for the First Circuit affirmed the Board in a *per curiam* opinion, *N.L.R.B. v. N. J. MacDonald & Sons*, 62 LRRM 2296, No. 6686, decided May 5, 1966, holding that the Board had not acted arbitrarily in ruling that the employer's refusal to bargain was unwarranted.

session was held after the Company recognized the Union, and only two weeks later recognition was withdrawn. We submit that the Board properly held that once a union is lawfully recognized, an expression of employee dissatisfaction with it does not justify a refusal to bargain if that expression is manifested before the collective bargaining relationship has had a reasonable period of time in which to succeed.[7] *Universal Gear Service Corp.*, 157 NLRB 1169, enforcement pending, No. 17,699 (C.A. 6); *Montgomery Ward & Co., Inc.*, 162 NLRB No. 27, enforcement pending No. 16,602 (C.A. 7); *N. J. MacDonald & Sons, Inc., supra*, n. 6. And since a reasonable period of time had not expired prior to the instant refusal to bargain, the Company should be required to resume the illegally aborted negotiations.[8]

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[7]Of course, since the employees' dissatisfaction with the union prior to the expiration of such reasonable time does not excuse the employer's obligation to bargain, his action in continuing to bargain does not constitute illegal assistance of the union, and is not violative of Section 8(a)(2) and (1) of the Act. *Keller Plastics Eastern, Inc.*, 157 NLRB 583, 585-587.

[8]Note that the Supreme Court in *Franks Bros.* was careful to reaffirm the employees' ultimate right to reconsider their initial choice of a bargaining agent. The Court stated (321 U.S. at 705-706):

> [A] Board order which requires an employer to bargain with a designated union is not intended to fix a permanent bargaining relationship without regard to new situations that may develop. See *Great Southern Trucking Co. v. Labor Board*, 139 F.2d 984, 987. But, as the remedy here in question recognizes, a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed. See *Labor Board v. Appalachian Power Co.*, 140 F.2d 217, 220-222; *Labor Board v. Botany Worsted Mills*, 133 F.2d 876, 881-882. After such a reasonable period the Board may, in a proper proceeding and upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships.

See also, *Sakrete of Northern California, Inc. v. N.L.R.B.*, 332 F.2d 902, 909 (C.A. 9), cert. denied, 379 U.S. 961.

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the order of the Board in full.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
MARCEL MALLET-PREVOST,
Assistant General Counsel,
WARREN M. DAVISON,
ROBERT M. LIEBER,
Attorneys,
National Labor Relations Board.

May 1968.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

Marcel Mallet-Prevost
Assistant General Counsel
National Labor Relations Board

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

APPENDIX B

Pursuant to Rule 18(f) of the rules of the Court

GENERAL COUNSEL'S EXHIBITS

No.	Identified	Offered	Received in Evidence
(Pages)			
1(a) through L 1(m)	4	4	4

JOINT EXHIBIT

1	13	13	13

WITNESS FOR THE GENERAL COUNSEL

Karl Wray	
Direct	14
Cross	36

WITNESS FOR RESPONDENT

Lyman Powell	
Direct	42
Cross	52